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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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**FEDERAL COMMUNICATIONS COMMISSION**  
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In the Matter of )  
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Implementation of the Satellite Home )  
Viewer Improvement Act of 1999 ) CS Docket No. 99-363  
 )  
Retransmission Consent Issues )

**PETITION FOR RECONSIDERATION**

The Wireless Communications Association International, Inc. ("WCA"), by its attorneys, hereby submits its Petition for Reconsideration with respect to the Commission's *First Report and Order* in the above-captioned proceeding.<sup>1/</sup>

First and foremost, WCA applauds the Commission's recognition in the *First Report and Order* that the market power of the large cable MSOs may have a chilling effect on the willingness of local television stations to negotiate reasonable retransmission consent agreements with cable's competitors, and that the Commission's definition of "good faith" retransmission consent negotiations must account for that fact. As noted during the initial comment phase of this proceeding, the rapid consolidations of the cable MSOs and the intertwining relationships between the MSOs and the national television networks certainly lend credence to the Commission's concerns about the MSOs' potential influence over a local television station's offer of retransmission

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<sup>1/</sup> *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363, FCC 00-99 (rel. Mar. 16, 2000) (the "*First Report and Order*").

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consent to an alternative multichannel video programming distributor (“MVPD”).<sup>2/</sup> Appropriately, then, a local television station will be presumed *not* to be negotiating in good faith with an alternative MVPD where it proposes compensation or carriage terms that result from an exercise of market power by other MVPDs.<sup>3/</sup> Equally important, the Commission has stated that it will examine the “totality of the circumstances” in determining whether a local television station’s conduct, though not a *per se* violation of the Commission’s objective good faith criteria, nonetheless reflects the absence of a sincere desire to reach an agreement that is acceptable to both parties.<sup>4/</sup> These actions represent an encouraging first step toward ensuring that alternative MVPDs and their subscribers enjoy full and fair access to local broadcast programming.

WCA believes, however, that other elements of the Commission’s decision leave open the possibility that local television stations may discriminate against alternative MVPDs during the retransmission consent process. In particular, certain procedural issues raised in the *First Report and Order* require reconsideration or clarification by the Commission at this time. First, as in the case of program access, the Commission has adopted a one-year statute of limitations for MVPD-initiated retransmission consent complaints, and indicated that retransmission consent negotiations that allegedly violate the Commission’s rules trigger the one-year period *if* they are unrelated to any existing agreement between the parties.<sup>5/</sup> In case-by-case adjudications in the program access arena,

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<sup>2/</sup> See, e.g., Comments of BellSouth Corporation *et al.*, CS Docket No. 99-363, at 8-9 (filed Jan. 12, 2000).

<sup>3/</sup> *First Report and Order* at ¶ 58.

<sup>4/</sup> *Id.* at ¶ 30.

<sup>5/</sup> *Id.* at ¶ 77.

the Commission has ruled that a programmer's offer to amend an existing contract after expiration of the one-year period does not trigger a new one-year filing period, and that program access complaints arising from such offers therefore are time-barred.<sup>6/</sup>

What is not entirely clear, however, is how the one-year statute of limitations will operate where an MVPD's complaint arises from negotiations to renew an existing retransmission consent agreement with a local television station. Of particular concern to WCA is the fact that many such negotiations occur after an existing retransmission consent agreement has been in force for more than a year. Under a literal reading of the Commission's one-year rule, renewal negotiations could be deemed "related" to the existing contract between the parties, and thus an MVPD complaint based on such negotiations might be time-barred if filed more than one year after the date of the existing contract. Since this could preclude alternative MVPDs from filing renewal-based retransmission consent complaints in the vast majority of cases, WCA assumes that the Commission did not intend that the one-year statute of limitations be enforced in this manner. Accordingly, to ensure that there is no confusion among alternative MVPDs and local television stations about this issue, WCA asks that the Commission clarify that negotiations between an MVPD and a local television station to renew an existing retransmission consent agreement are not "related" to the parties' existing contract for purposes of the one-year statute of limitations, and that such negotiations therefore trigger a new one-year filing period.

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<sup>6/</sup> *EchoStar Communications Corporation v. Fox/Liberty Networks LLC et al.*, 14 FCC Rcd 10480 (CSB, 1999); *see also* 1998 Biennial Regulatory Review - - Part 76 - Cable Television Service Pleading and Complaint Rules, 14 FCC Rcd 418, 424 (1998), *recon. denied*, 14 FCC Rcd 16433 (1999).

Second, the Commission has ruled that an MVPD complainant bears the burden of proving that a defendant local television station has violated the Commission's "good faith" negotiation requirement, and, apparently, that the complainant's burden does not shift to the defendant under any circumstances.<sup>2/</sup> As noted above, however, the Commission has established a presumption that a local television station is not negotiating in good faith with an alternative MVPD where it proposes compensation or carriage terms that result from an exercise of market power by other MVPDs. The Commission's decision to impose the burden of proof exclusively on MVPD complainants in all cases thus is inconsistent with the Commission's prior policy of shifting the burden of proof where the complainant makes out a *prima facie* case that a legal presumption against the opposing party should apply. For example, under the Commission's rules concerning preemption of local zoning regulation of C-Band satellite earth stations, the Commission adopted a rebuttable presumption under which certain state and local regulation of such facilities is presumed unreasonable, and, where the presumption is shown to apply, the state or local authority at issue bears the burden of proving that its regulation is permitted under the Commission's Rules.<sup>3/</sup> As noted in WCA's initial comments in this proceeding, alternative MVPDs are at a substantial disadvantage during the Commission's retransmission consent complaint process insofar as it does not guarantee that they

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<sup>2/</sup> *First Report and Order* at ¶ 89; 47 C.F.R. § 76.65(d).

<sup>3/</sup> See 47 C.F.R. § 25.104(b); *Preemption of Local Zoning Regulations of Satellite Earth Stations*, 11 FCC Rcd 5809 (1996). See also *Access to Telecommunications Equipment and Services by Persons with Disabilities*, 11 FCC Rcd 8249 (1996) (Commission adopts rebuttable presumption that, by a date certain, all workplace non-common area telephones would be hearing aid compatible, thereby shifting the burden of proof to the party alleging otherwise).

will have access to critical documents within the exclusive possession of the defendant broadcaster.<sup>9/</sup> This is especially true where an alternative MVPD alleges that a local television station's "bad faith" arises from the exercise of market power by other competing MVPDs. In such cases, the most significant evidence that supports the complainant's case usually is contained within written or unwritten communications between the defendant broadcaster and third parties, which invariably are confidential and thus unavailable to the complainant. Given that the Commission has already established a presumption against a finding of good faith in "market power" cases, it is inequitable to force an alternative MVPD to endure the additional burden of procuring such evidence where its complaint already establishes a *prima facie* case that the presumption should apply. Moreover, failure to shift the burden of proof to the defendant in such cases will often require complainants to ask the Commission to order discovery, thus increasing the administrative burden on the Commission's staff and delaying resolution of the underlying complaint. Since the Commission has already recognized that expeditious processing of MVPD-initiated retransmission consent complaints is in the public interest, there is no legitimate policy justification for the Commission's Rules to produce the opposite result.<sup>10/</sup> Accordingly, WCA asks that the Commission amend Section 76.65(d) of its Rules to provide that where an MVPD's complaint alleges facts that, if true, would establish a *prima facie* case that the Commission's "market power" presumption against the defendant broadcaster should apply, the burden of proof will shift to the defendant broadcaster,

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<sup>9/</sup> Comments of The Wireless Communications Association International, Inc., CS Docket No. 99-363, at 16-17 (filed Jan. 12, 2000).

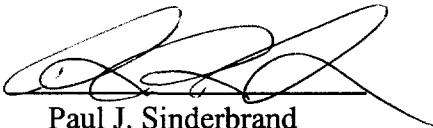
<sup>10/</sup> See *First Report and Order* at ¶ 85.

subject to any protective order or other action the Commission deems necessary to protect the defendant's confidential documents.<sup>11/</sup>

WHEREFORE, for the reasons stated herein, WCA requests that the Commission reconsider its *First Report and Order* in this proceeding consistent with the recommendations set forth above.

Respectfully submitted,

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<sup>11/</sup> WCA also asks that the Commission adopt a similar approach where the Commission's other presumptions against a defendant broadcaster are shown to apply. *See First Report and Order* at ¶ 58 (presumption against a local television station will apply where it makes proposals that specifically foreclose an MVPD from carrying nonduplicative programming from other sources; where it makes proposals that result from agreements not to compete or to fix prices; or where it makes proposals for contract terms that would foreclose the filing of complaints with the Commission).